Life Care Centers of America, Inc. d/b/a Lakeside Health Center *and* SEIU 1199 Florida, AFL–CIO, CLC. Case 12–CA–22172

September 29, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On January 17, 2003, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Life Care Centers of America, Inc. d/b/a Lakeside Health Center, West Palm Beach, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. September 29, 2003

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Susy Kucera, Esq., for the General Counsel.
Mark E. Levitt, Esq., of Tampa, Florida, for the Respondent.
Mr. Dale Ewart, for the Charging Party.

[1] In adopting the judge's finding that the Respondent violated Sec. 8(a)(5), we find it unnecessary to rely on the judge's discussion of contractual waiver of bargaining rights in sec. B of the decision because there was no agreement in effect between the Respondent and the Union at the time of the Respondent's unilateral change.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. The hearing was opened and closed telephonically on December 2, 2002, pursuant to the agreement of all parties, at which time I granted the joint motion of all parties to submit this case by stipulation and received the stipulation and exhibits. The charge, filed on March 26, 2002, was amended on May 30, 2002. The complaint issued on August 27, 2002. The complaint alleges that the Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act by unilaterally discontinuing its matching contribution to its 401(k) plan. The Respondent's answer denies that its conduct violated the Act. I find that the Respondent did violate the Act as alleged in the complaint.

On the entire record[1] and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

The Respondent, Life Care Centers of America, Inc., d/b/a Lakeside Health Center, the Company, a Tennessee corporation, is engaged in the operation of nursing homes at various locations including its facility in West Palm Beach, Florida, at which it annually derives gross revenues in excess of $100,000 and purchases and receives goods valued in excess of $10,000 directly from points located outside the State of Florida. The Respondent admits, and I find and conclude, that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that SEIU 1199 Florida, AFL–CIO, CLC (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

I. ALLEGED UNFAIR LABOR PRACTICES

A. Stipulated Facts

The Company operates approximately 260 facilities in the United States and offers various benefits to its employees at those facilities including a 401(k) plan that was established on or about July 1, 1992. Approximately 16,000 of the Company's employees are eligible to participate in the 401(k) plan, of which approximately 8000 have chosen to participate. At the Company's West Palm Beach, Florida Lakeside facility, as of January 1, 2002, approximately 50 employees were eligible to participate in the plan and approximately 21 were participants.

On March 27, 2001, the Regional Director for Region 12 approved a Stipulated Election Agreement pursuant to which an election was held on April 20, 2001, at the Company's Lakeside facility among employees in the following appropriate unit:

> All full-time and regular part-time CNAs, rehabilitation aides, activity aides, housekeeping aides, housekeeping technicians, laundry, dietary aides, dietary cooks, plant maintenance, re-

[1] The record consists of the 10-page transcript, ALJ Exh. 1, the joint motion, GC Exh. 1, the formal papers, and the Stipulation with Exhs. 2 through 11 attached thereto.

> storative CNAs, medical records clerks and floor technicians employed by the Employer at its 2501 Australian Avenue, West Palm Beach, Florida, facility; *excluding* all other employees including RNs, LPNs, central supply clerks, other technical employees, confidential employees, professional employees, office clerical employees, guards and supervisors as defined by the Act.

The employees selected the Union as their collective-bargaining representative, and on May 3, 2001, the Union was certified. At all times since May 3, 2001, the Union has been the Section 9(a) exclusive collective-bargaining representative of the employees in the foregoing unit. In August 2001 the parties began negotiations for a collective-bargaining agreement. Those negotiations were successfully concluded and the parties entered into a collective-bargaining agreement effective October 1, 2002.

The only issue in this proceeding relates to the 401(k) plan that was established on July 1, 1992. The Company has, since July 1, 1992, deducted employee contributions to the 401(k) plan from the paychecks of those employees who elected to participate in the plan. From July 1, 1992, until January 1, 2002, the Company had made a matching contribution in the amount of 50 percent of the employees' contributions up to the first 3 percent of the employees' earnings for those employees who participated in the plan. This was a companywide plan, and the same contributions were made for all 8000-employee participants in the plan.

Section 3.02 of the original 401(k) plan, in pertinent part, provided:

> The Employer shall contribute . . . an amount equal to a percentage of Deferred Cash Contributions made on behalf of the Member of the Plan during each payroll period, such percentage to be determined each Plan Year by the Board of Directors as of the last day of the preceding Plan Year. In no event however, shall the Employer Matching Contribution pursuant to this Section exceed 50 percent of the first 3 percent of the [member's earnings] . . . each payroll period.

The plan was amended on December 19, in 2000 and 2001, but neither of those amendments related to section 3.02. On December 28, 2001, the Company amended section 3.02 of the plan. The preamble to the amendment states that, "the Employer now wishes to amend the Plan to provide the Employer with discretion in determining the matching contribution under the Plan." As amended, the pertinent part of section 3.02 now states:

> The Employer *proposes to* contribute . . . an amount equal to a percentage . . . of the Deferred Cash Contributions made on behalf of the Member during each payroll period, such percentage to be determined by the Board of Directors *from time to time and such percentage to be effective until such time as determined by the Board of Directors.* In no event however, shall the Employer Matching Contribution pursuant to this Section exceed 50 percent of the first 3 percent of the [member's earnings] . . . each payroll period. [Emphasis added for clarity.]

On December 28, 2001, the board of directors adopted the amendment granting it the authority to determine company contributions "from time to time," and suspended the company contribution to the 401(k) plan effective January 1, 2002. A notice stating this was included with employee paychecks and posted on the employee bulletin board at the Lakeside facility in early January. The notice, in pertinent part, states:

> Effective January 1, 2002, the Employer Matching Contribution is suspended and will not be made again until such time as determined by the Board of Directors."

A letter to all employees from Life Care Chairman and CEO Forrest L. Preston dated January 14, 2002, regarding the performance of the Company, reports that preliminary indications are that "we have been fortunate if we have breakeven operations for the company" for the past year. The letter then notes that, "during the year of 2002, the employer matching contribution [for the 401(k) plan] has been suspended" as a cost saving measure, that the action is the "financially responsible thing for us to implement," but that "the corporate contribution will be reinstated at the earliest date that it becomes financially viable."

In mid-January 2002, the administrator of the Lakeside facility, Karen DiPiero, a stipulated supervisor and agent of the Company, held staff meetings with employees at which she announced the suspension of matching contributions.

Although section 3.02, had, prior to December 28, 2001, provided that the percentage of the Company's contribution would be determined by the board of directors "each Plan Year," the contribution had, at all times prior to January 1, 2002, been the maximum, "fifty percent of the first three percent of the employees' earnings." (Stipulation, par. 10.)

In 2001 the stipulation of the parties does not specify the date, a description of this benefit was distributed to employees in a booklet entitled "Life Care 401k Savings Plan Summary Plan Description." The summary description, at pages 4 and 5, informs employees that Life Care will make a contribution each pay period that, "will be 50% of the first 3% of pay that you contribute as a Deferred Cash Contribution for each pay period." Notwithstanding the foregoing, at page 13, the summary description states that, "future conditions cannot be foreseen" and that "Life Care, through its Board of Directors, reserves the right to change or terminate this Plan at any time."[2]

After the parties commenced collective-bargaining negotiations in August 2001 and prior to January 1, 2002, the Company proposed that unit employees receive the same 401(k) benefits as nonrepresented employees. The Union did not agree to that proposal. There was no impasse relating to that proposal.

Prior to suspending the company matching contribution effective January 1, 2002, and announcing that suspension to employees by the notice included with their paychecks and posted on the bulletin board and by the meetings with Adminis-

[2] The booklet, attached to the stipulation as Exhibit 8, currently includes the notice that was distributed in January 2002 advising that contributions were suspended. At the time of initial distribution in 2001, the notice would not have been included since it did not exist until 2002.

trator DiPiero, the Company did not notify the Union and "did not offer to bargain with the Union specifically about Respondent's suspension of the 401(k) match or the effect of the suspension of the 401(k) match." [Stipulation, para. 18.]

The parties reached agreement on a collective-bargaining agreement in September 2002 and, on ratification, it became effective on October 1, 2002. Article 17 of the agreement provides that the "Employer shall continue to make available a 401(k) program on the same basis as offered to non-represented employees of the Employer."

B. Analysis and Concluding Findings

The General Counsel, citing various cases including *Mid-Continent Concrete*, 336 NLRB 258 (2001), enfd. 308 F.3d 859 (8th Cir. 2002), and *Britt Metal Processing*, 322 NLRB 421 (1996), points out that the Respondent had matched employees' 401(k) contributions at the same level since that benefit was extended to them and that, "absent a different agreement reached with the Union, the status quo right of the employees represented by the Union was that same matching contribution." The General Counsel argues that by unilaterally discontinuing the matching contribution, the Respondent violated Section 8(a)(5) of the Act.

The Respondent, citing *Post-Tribune Co.*, 337 NLRB No. 192 (2002), argues that it was privileged to change the matching contribution because the plan specifically authorizes it to do so and that suspension of the contribution did not constitute a change in the status quo. The Respondent does not contend that its action was privileged because it treated represented employees in the same manner as nonrepresented employees. Had it done so, I would have rejected that contention. *Mid-Continent Concrete*, supra at 260.

In *Post-Tribune Co.*, the Board succinctly stated the principle relating to a unilateral change in the status quo:

> An employer violates Section 8(a)(5) and (1) if it makes a unilateral change in wages, hours, or other terms and conditions of employment without first giving the Union notice and an opportunity to bargain. See *NLRB v. Katz*, 369 U.S. 736, 743 (1962). "[T]he vice involved in [a unilateral change] is that the employer has *changed* the existing conditions of employment. It is this *change* which is prohibited and which forms the basis of the unfair labor practice charge." *Daily News of Los Angeles*, 315 NLRB 1236, 1237 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997) (quoting *NLRB v. Dothan Eagle*, 434 F.2d 93, 98 (5th Cir. 1970)). Therefore, where an employer's action does not change existing conditions—that is, where it does not alter the status quo—the employer does not violate Section 8(a)(5) and (1). See *House of the Good Samaritan*, 268 NLRB 236, 237 (1983). An established past practice can become part of the status quo. See *Katz*, 369 U.S. at 746. Accordingly, the Board has found no violation of Section 8(a)(5) and (1) where the employer simply followed a well-established past practice. See, e.g., *Luther Manor Nursing Home*, 270 NLRB 949, 959 (1984), affd. 772 F.2d 421 (8th Cir. 1985); *A-V Corp.*, 209 NLRB 451, 452 (1974).

Id., slip op. at 1–2.

Applying the foregoing principle in that case, the Board found that the respondent had "a consistent, established practice of allocating insurance premiums," that the respective percentages of the premiums paid by the company and the employees did not change, and thus, the status quo did not change although the amount that employees paid increased. In those circumstances, the Board held that the status quo did not change and that the Respondent did not violate the Act.

Thus, the initial inquiry in this case is to determine and identify the status quo. The Board's language in *TCI of New York*, 301 NLRB 822 (1991), although referring to a bonus rather than a 401(k) contribution, is instructive in this regard:

> It is well settled that a bonus paid consistently over a number of years is a component of employee wages and a term and condition of employment, even though not expressly provided for in the bargaining agreement, and that it cannot be unilaterally altered or abolished by the employer without affording the Union notice and an opportunity to bargain. *Gas Machinery Co.*, 221 NLRB 862, 865 (1975). Thus, the Respondent's unilateral discontinuation of the bonus program constitutes an unlawful refusal to bargain unless, as the Respondent contends, the Union has waived its right to bargain over this matter. *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

I cannot conclude, as argued by the Respondent in this case, that its action did not alter the status quo. In the instant case, the Respondent's 401(k) match in the amount of 50 percent of the employees' contributions, up to 3 percent of the employees' earnings, had not varied for 9-1/2 years, since July 1992. Every payroll period for 9-1/2 years the match had been paid. In 2001 the Respondent distributed to employees a booklet stating that this was the match. As the Respondent argues, the document does state that the benefits described are defined by the plan, but when stating the benefit, the document does not state that the match will be a variable percentage depending on what the board of directors decides. It states that the employer's match "will be 50% of the first 3% of pay that you contribute."

The Respondent's argument that the "plan . . . authorizes it" to determine the matching contribution ignores the obvious fact that the plan itself is a creation of the corporation and that the matching contribution is controlled by the corporate board of directors. The 401(k) matching contribution was a benefit that the Respondent was not privileged to reduce without notice to and bargaining with the Union. *Britt Metal Processing*, supra at 421. Even when a benefit plan has been incorporated into a collective-bargaining agreement, changes in that plan may not be made without notice and bargaining unless the language incorporating the plan constitutes a "clear and unmistakable waiver." See *Trojan Yacht*, 319 NLRB 741 (1995), and *Exxon Research & Engineering Co.*, 317 NLRB 675 (1995), enf. denied 89 F.3d 228 (5th Cir. 1996). (Enforcement was denied because Exxon Corporation was not a named respondent. The Court of Appeals expressed no opinion regarding the issue of waiver. 89 F.3d at 232.)

The Respondent's argument might well have merit if, over the nine and one half years that it had extended this benefit to employees, the amount of the matching contribution had varied and an announcement had been made each January specifying

the amount that would be matched during the forthcoming year. There is no evidence of any annual announcement. It is stipulated that there was no variance in the contribution. The suspension of the matching contribution by the board of directors in response to economic circumstances was a discretionary act. In *Eugene Iovine, Inc.*, 328 NLRB 294 (1999), enfd. mem. 242 F.3d 366 (2d Cir. 2001), in addressing a discretionary reduction in employee working hours, the Board stated: "The Board and the courts have consistently held that such discretionary acts are . . . 'precisely the type of action over which an employer must bargain with a newly-certified union.'"

The complaint alleges that the Respondent unlawfully discontinued matching contributions for employees by failing to give notice to the Union, or affording it an opportunity to bargain. The record establishes the violation alleged in the complaint.

CONCLUSION OF LAW

By unilaterally, without notice to or bargaining with the Union, suspending its contribution to the 401(k) plan, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having unlawfully suspended its contribution to the 401(k) plan, must make whole all affected employees by contributing 50 percent of the first 3 percent of pay that participating employees made for each payroll period between January 1, 2002, and October 1, 2002, the effective date of the collective-bargaining agreement into which it entered with the Union, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusion of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Life Care Centers of America, Inc. d/b/a Lakeside Health Center, West Palm Beach, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with SEIU 1199 Florida, AFL–CIO, CLC by unilaterally suspending the Respondent's contribution to the 401(k) plan.

(b) In any like or related manner interfering with, restraining, and coercing employees in the exercise of rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Bargain in good faith with the SEIU 1199 Florida, AFL–CIO, CLC prior to making any changes in the wages, hours, and terms and conditions of employment of employees in the following appropriate bargaining unit:

> All full-time and regular part-time CNAs, rehabilitation aides, activity aides, housekeeping aides, housekeeping technicians, laundry, dietary aides, dietary cooks, plant maintenance, restorative CNAs, medical records clerks and floor technicians employed by the Employer at its 2501 Australian Avenue, West Palm Beach, Florida, facility; *excluding* all other employees including RNs, LPNs, central supply clerks, other technical employees, confidential employees, professional employees, office clerical employees, guards and supervisors as defined by the Act.

(b) Within 14 days from the date of this Order, rescind the unlawfully imposed suspension of matching contributions for the period January 1, 2002, until October 1, 2002.

(c) Make whole all affected employees by contributing 50 percent of the first 3 percent of pay that participating employees made to the 401(k) plan for each payroll period between January 1, 2002, and October 1, 2002, with interest, as set forth in the remedy section of the decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in West Palm Beach, Florida, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2002.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 17, 2003

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain in good faith with the SEIU 1199 Florida, AFL–CIO, CLC prior to making any changes in the wages, hours, and terms and conditions of employment of you who are represented by the Union, and WE WILL NOT unilaterally suspend our contribution to the 401(k) plan.

WE WILL NOT in any like or related manner interfere with, restrain, and coerce you in the exercise of rights guaranteed them in Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, rescind our unlawfully imposed suspension of matching contributions for the period January 1, 2002, until October 1, 2002, and make whole those of you who were affected as set forth in the remedy section of the decision.

LIFE CARE CENTERS OF AMERICA, INC., D/B/A
LAKESIDE HEALTH CENTER